CONVEYANCING IN THE PROVINCE OF QUEBEC.

A solicitor who has had experience as a conveyancer in any of the other Canadian provinces is at first disappointed when he finds on coming to Quebec to practice that in Quebec the bulk of the conveyancing is done by Notaries who, as is well known, belong to a distinct profession founded on the French Notarial system. An Advocate may not be a Notary or a Notary an Advocate, at one and the same time. In a few cases young men take the examinations and qualify as Advocates and Notaries and then elect. Occasionally after practicing a number of years as a Notary, a man will qualify as an Advocate as in the case of Mr. Justice Mathieu (for many years a Professor at Laval University) who sat for twenty-five years as a judge of the Superior Court and whose experience as a Notary is thought to have made him a stronger lawyer.

PROMISE OF SALE

The principal steps taken in connection with the sale and purchase of a lot of land are as follows. No doubt there are more sales where a part only of the purchase price is paid and in most of such cases a promise of sale is given by the vendor. There is no statutory form. The land must be described by a cadastral number, the subdivision number and usually also by metes and bounds.

Cadastre, sometimes cadaster, is of course a French word meaning an official statement or register of the quantity. and ownership of real estate.

In Montreal where there are so many expropriations it is advisable to include a clause providing for the respective rights of the parties in the event of the property being expropriated during the term of the promise of sale.

Article 1590 of the Civil Code provides: "In the case of sales and expropriations for purposes of public utility the party acquiring the property cannot be evicted. The hypothecs and other charges are extinguished, saving to the creditors their recourse upon the price and subject to the special laws relating to the matter."

The small red seal is not commonly used in completing agreements. These agreements of sale are rarely registered. In most carefully drawn promises of sale there is a clause prohibiting the registering of the documents and this is a wise provision, otherwise an unscrupulous person might tie up a valuable property for months or perhaps years and force the owner, as has been done, to pay an amount in order to have removed what any person searching the title would be justified in calling a cloud on the title.

To make registration possible, the agreement must be signed in the presence of two witnesses (or be in notarial form) one of whom must make an affidavit as to the execution of the agreement. Even though this provision is complied with the registration of the agreement does not bind the land unless the purchaser has actually taken possession of the land. The Code seems quite clear as to this but during last year the Superior Court in the case of *Courville* v. *Wilder* (Mr. Justice ARCHIBALD) decided a unilateral promise of sale or option does not bind the land and should not be registered.

As a rule in this province, the wife of the vendor does not sign the agreement of sale of property owned by the husband or held in community but of course she must sign if it is her separate property and the husband must sign also. As usually no search has been made of the title at the time of taking the promise of sale the better practice is to have the wife renounce her dower right unless one is perfectly sure the wife is not entitled to dower. The immoveables which the consorts possess on the day of the marriage or which come to them during its continuance by succession or equivalent title are separate property.

All property held in community may be sold by the husband without the signature of the wife. When property is held in community all the moveable property owned by the consorts at the time of the marriage or which they acquire during marriage or which falls to them during that period by succession or by gift, if the donor or testator have not otherwise provided, and also all the revenues, interests and arrears arising from the properties real and personal which belonged to the consorts at the time of the marriage or which has come to them during marriage by any title whatever belong to the community. The immoveables they acquire during the marriage belong to the community. The wife has a dower right (usufruct for the wife and ownership for the children) in one-half of all the immovables owned by the husband at the time of the marriage and all immoveables which he receives during the marriage by succession from his ascendants. This right can only be renounced if done in writing and specifically by the wife.

A sale of the husband's land under execution does not bar the dower. The wife need not pay succession duty on her dower.

SEARCH OF TITLE

In most cases the title deeds are kept together and are given to the person searching the title for perusal at his office. These are not the original title deeds, if completed by a Notary but certified copies as the originals remain in the office of the Notary and such

originals need not be produced even in Court unless the Notary attends Court and produces the document asked for. A certified copy serves for registration purposes so that authentic deeds are registered in two places, namely, with the Notary and at the registry office.

Registration is at length or by memorial. When registered at length the title or document is recorded or extracts certified and delivered by a Notary or by a prothonotary of the Superior Court which extract must contain the date, place of execution and nature of the instrument, the names and descriptions of the parties to it, the name of the Notary before whom it was received, the clauses or parts of clauses extracted at full length and the date on which the extract is delivered which date must be noted on the originals.

Registration by memorial is effected by means of a summary setting forth of the real rights which the party interested wishes to preserve and this is recorded. The memorial must be signed by the party interested and attested to by two subscribing witnesses.

Under Article 1218 of the Civil Code: "Copies of notarial instruments and of extracts therefrom, of all authentic documents whether judicial or not, of papers of record, and of all documents and instruments in writing, even those under private signature, or executed before witnesses, lawfully registered at full length, when such copies bear the certificate of the registrar, are authentic evidence of such documents, if the originals have been destroyed by fire or other accident, or otherwise lost."

In all formal documents and when bringing or defending actions in Court the maiden name of the wife is used and, particularly in connection with titles, this makes it much easier to trace family connections. A married woman is described as Dame Jane Brown, wife of John Smith. Fortunately in this province great care has been exercised since the earliest days as to the keeping of the records of births, deaths and marriages.

In most cases documents showing a complete chain of title are handed to the purchaser and also an abstract signed by the registrar of deeds which gives the date and a brief description of each document registered against a particular lot. It is generally necessary to have the registrar's abstract brought down to date. If any of the title deeds are missing (and this is the exception) one must visit the registry office or as is oftener done, order copies from the Notary if the documents are authentic.

The advantages of the system of registering against each separate lot are considerable particularly in a large city and no doubt some

of the other provinces will adopt a similar system as their population increases unless they do better still and follow the good example of the Western provinces, which have adopted the Torrens system. I have very clear recollections of searching the title of land of John McDonald at the office of the Registrar of Deeds for Cape Breton County, Nova Scotia, there being at least fifty landowners in the County named John McDonald. However, when one wishes to record a judgment here in a hurry he is apt to wish he could record it in any County or district where the judgment debtor is likely to have property without the necessity of first learning exactly what lots are owned by the debtor so that the judgment may be registered against each particular lot. Of course a search must be made for unpaid municipal taxes and if the property is or has been owned by a member of the Roman Catholic Church a search must be made for any unpaid tithes or any specific Church tax. A search must also be made at the office of the collectors of succession duties.

About one-quarter only of the land of the Province is still held under Seigniorial tenure, most of the land once under this tenure having been commuted, that is, a sum has been paid in full settlement of the rights of the Seignior, the land being held according to the Code "in free and common soccage." Some land is held under what is called a "constituted rent" and the land is referred to as a "constitute." The capital sum to be paid is constituted or fixed and the occupier has in many cases ninety-nine years in which to pay it and in the meantime pays yearly or half yearly an amount equal to agreed interest on the capital sum which may by law be paid off at any time.

In searching the title of land situated in this province and held by a company incorporated outside of this province it is necessary to see that the permission of the Quebec Government has been granted authorising such a company to hold land situated within the Province of Quebec so as to comply with the statute of Mortmain. Such right is granted by Order in Council on application to the Provincial Secretary.

DEEDS

When the solicitor's report on the title is completed and if everything is found in order the deed is to be prepared. The form of deed is not statutory but the form in common use is very similar to that used in the other provinces. Again one notices the absence of the small red seal even where the deed is "under private writing." If the vendor or purchaser are outside the province they must appoint a person within the province by power of attorney to appear

on their behalf to sign the deed. It is difficult to see the necessity of putting purchasers to this extra expense or of requiring purchasers to sign the deed. If the purchase price is paid in full and the purchaser takes delivery of the deed and possession of the land there can be no question as to the transfer having been completed. If there is any real necessity for the purchaser to sign, persons living in the other provinces and the adjoining states would have (which is not the case) very great difficulty with their deeds of sale. This provision of course has the effect of making it necessary to complete all deeds before a Notary in the province except in the case of deeds which may be made in the presence of two witnesses one of whom makes an affidavit as to the execution of the deed.

The following documents must be in notarial form:—marriage contracts, deeds containing gifts inter vivos and acceptances of the same, inventories concerning successions, community property or the like, awards of arbitrators, deeds of sale of real estate and conventional hypothecs unless the land is held in fee simple (as in the case in Montreal and surroundings) or is situated in the Counties of Missisquoi, Shefford, Stanstead, Sherbrooke and Drummond (whatever may be their tenure). Such mortgages may be in the very short and comprehensive form specified in the fifty-eighth section of chapter thirty-seven of the Consolidated Statutes of Lower Canada.

HYPOTHECS

If part of the purchase price is to be secured by a mortgage one document serves the purpose of a deed and mortgage and in such cases there is a real necessity for both parties signing. The usual form of mortgage contains practically the same clauses and conditions as are ordinarily used in the other provinces. The mortgage bond is included in the mortgage.

Hypothecs are (1) legal, resulting from the law alone, (2) judicial, resulting from judgments or judicial acts, and (3) conventional, resulting from an agreement. Married women have a legal hypothec for all claims and demands which they may have against their husbands on account of whatever they may have received or acquired during marriage by succession, inheritance or gift.

Conventional hypothecs must give the designation of the coterminous lands, or of the number or name under which it is known, or of the lot or part of the lot and range, or of its number upon the plan and book of reference of the registry office, if such plan and book of reference exists.

Some loan companies make it a rule to insist on the wife renouncing her dower in every mortgage which they take as security. The mortgage is made as brief as possible, the conditions being in a second document which is referred to in the mortgage as being a part thereof. The main mortgage only is registered, the saving in fees being considerable.

An action for the foreclosure of a mortgage is much the same as in the other provinces and fortunately there are comparatively few foreclosure actions in the District of Montreal or throughout the province. At the different registry offices a special book is kept for the address or election of domicil of all hypothecary creditors and of every transferee, heir, donee or legatee of an hypothecary creditor. The registrar must be given the address from time to time of the hypothecary creditor and that being done the registrar (who is always notified of sales under seizure or in suits for partition or of an application for the confirmation of a title) must immediaely send by registered letter to each hypothecary creditor whose name is entered in the register of addresses a notice that the land hypothecated to him is under seizure or to be soid by order of the Court as the case may be and of the time and place of the sale.

Prior to 1904 there was doubt as to the safety in loaning to a married woman money secured by a mortgage. Article 1301 of the Civil Code prior to 1904 provided "A wife cannot bind herself either with or for her husband, otherwise, than as being common as to property; any such obligation contracted by her in any other quality is void and of no effect."

The case of *Trust & Loan Co.* v. *Gauthier,* R. J. 2, 12 K. B., p. 231, decided finally by the Privy Council in 1903, held that where a loan is obtained by a married woman separated as to property from her husband, with hypothecation of her real estate, it is sufficient to show that the money although handed to her in the form of a cheque payable to her order, was not used by her, but was given to her husband, in order to bring the contract within the prohibition of Article 1301, Civil Code. Held further that the law does not require that the person from whom a wife obtains a loan should know that it is for the benefit and use of her husband. It is for the lender to exercise proper caution, and to see to the due employment of the loaned money for the purposes of the wife, even in the case of a deception by the wife, as to the use to which the money is to be applied. The legislature in 1904 added to Article 1301 of the Civil Code the words "saving the rights of creditors who contract in good faith." Since then more loans have been made to married women

but even now some loan companies and some individuals prefer not to take mortgages from married women. When such mortgages are completed it is necessary for the wife (and the husband who must join in the mortgage) to make statutory declarations that none of the money advanced has gone to the husband for his use.

CHATTEL MORTGAGES

No chattel mortgages can be given in Quebec by individuals but during the last session of the legislature joint stock companies were given the right to give a trust deed securing an issue of bonds or debentures of any of their property, moveable or immoveable, present or future. The trust deed must be completed before a notary and must be registered where the property is situated and where the head office of the company is situated. No doubt, individuals, registered companies and partnerships will before long be granted the right to mortgage their personal property.

This provision does not interfere with or limit the right of companies to pledge their moveable property but the possession of the property must not remain in the possession of the pledgor. The seller of goods may enforce a lien in writing giving him the right to recover the goods if the purchaser fails to complete his payments and there is no necessity to register such liens which are very common. Notice of such a lien must be given to a landlord in order to bar his right to hold the goods covered by the lien. The notice may be given to the landlord at any time but before repossessing the vendor must pay any rent which is due on the date on which the notice is given. The seller also has the right to recover his goods if still in the possession of an insolvent provided the goods were delivered within thirty days just prior to the insolvency.

Transfers and mortgages of ships as in the other provinces are made under the provisions of the Merchant's Shipping Act.

MARRIAGE CONTRACTS

Marriage contracts contain clauses varying the law of community or the dower rights so as to meet the wishes of the parties or, as is most usual, contain the following clauses: (1) That the parties shall be separate as to property. (2) That the dower of the intended wife is renounced. (3) That the wife shall be the owner of the household goods, and (4) That the intended wife shall have the right to take at any time a sum of money the amount depending on the financial standing or financial expectations of the intended husband.

It is almost the invariable rule for residents of the cities and towns of Quebec, of the commercial and professional classes, at least, to have a marriage contract. In such contracts almost invariably the wife to be renounces her dower.

The question sometimes arises as to whether when the household goods have been seized for a debt of the husband the wife can claim the household goods. The jurisprudence holds that she may if the goods were owned by the husband at the time the marriage contract was completed provided the debt was not incurred before the date of the marriage contract. The wife is an ordinary creditor in the event of the insolvency of the husband for the amount donated to her under the contract provided the intention is clear that she had the right to the amount at once and not a mere right of survivorship and provided that at the time the contract was completed the husband was solvent and that no fraudulent intent can be shown.

Marriage contracts must be completed before a Notary and must be registered at the registry office of the district where the husband is domiciled. Marriage contracts completed outside of Quebec Province while the husband is domiciled outside Quebec Province are considered binding here if the parties later become domiciled here even though the contract is completed under private writing.

WILLS

Wills are (1) notarial, (2) holograph, or (3) "in the form derived from the laws of England." Wills completed before a notary need not be probated but a certified copy must be filed at the succession duties office together with the declaration usual in such cases. If there is a devise of real estate the notary on the death of the testator delivers to the proper registrar a notice containing the date of the death, a description of the land and the name of the devisee or devisees and also a copy of the will thus completing the chain of title at the registry.

The best practice now is to have the receivers of the succession duties intervene in the notice to avoid possible delay later by the loss of the certificate showing that the succession duties have been paid.

Holograph wills must be wholly written by the testator and signed by him and require neither notaries nor witnesses and no particular form is required. Such wills must be probated that is proven on the affidavit of someone who can swear positively as to the handwriting of the testator. Applications for probate are made exparte at what is known as the Tutelle Office (Tutorship Office) and if

there are any unusual circumstances it is necessary to go before a judge usually the judge for the time being sitting in the Practice Court.

Wills in the English form "must be in writing and signed at the end with the signature or mark of the testator made by himself or by another person for him in his presence and under his express direction, (which signature is then or subsequently acknowledged by the testator as having been subscribed by him to his will then produced), in the presence of at least two competent witnesses together, who attest and sign the will immediately in the presence of the testator and at his request." Such a will is probated on the affidavit of one of the witnesses. It will be noted that the attestation clause is similar to the clause used in the other provinces except that the witnesses must sign the will "immediately." Recently a client of mine while at the hospital had his will completed by a Notary. When he returned to his house he wrote a holograph will but did not appoint a trustee or executor and did not devise and bequeath all his property. He then asked to have a will prepared in the English form but did not have the strength to sign it. The holograph will was probated and that part of his estate which was not dealt with in his will was of course dealt with as if he had died intestate.

Some time ago I was asked to probate a will partly printed and the remainder written and signed by the testator. The witnesses had signed and the attestation clause was complete except for the absence of the word "immediately." Neither of the witnesses could take the required affidavit as they had not been present together. I made an application to have the will probated as a holograph will. The Tutelle Office referred me to the Practice Court judge, Mr. Justice CHARBONNEAU, who took the common sense view that there could be no question as to the intention of the testator who left all his property to his wife.

Wills made in Lower Canada or elsewhere by military men on active service out of garrison or by mariners during voyages, or on board ship or in hospital, which would be valid in England as regards their form are likewise valid in Lower Canada.

It is important that the exact words of the Code be used in the attestation clause as a warning as to just what is required to make the will valid.

The system which takes the place of the probate or Surrogate Court and which appears to be perfectly satisfactory is as follows: Some legal representative or legatee makes what is called a Declaration of Transmission setting forth the date of the death and the

names of the devisees and legatees (if there is a will) and otherwise the legal representatives. Usually some person interested in the estate (when the deceased has died intestate) is appointed as attorney for all the heirs. A number of originals of the declaration and the power of attorney are completed and on the strength of those and the certificate from the succession duties office the bank deposits, share certificates and other personal property are readily transferred to the rightful owner.

PARTNERSHIP DECLARATIONS

Partnership articles are much the same as in the other provinces. A declaration must be filed at the registry office as in the other provinces, and the declaration must state whether the partners are separate or in community as to property. If there is a marriage contract the date of it must be given and the name and address of the Notary before whom it was completed.

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